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Depriving America of Evolving Its Own Standards of Decency?: An Analysis of the Use of Foreign Law in Eighth Amendment Jurisprudence and Its Effect on Democracy

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DEPRIVING AMERICA OF EVOLVING ITS OWN STANDARDS OF DECENCY?: AN ANALYSIS OF THE USE OF FOREIGN LAW IN EIGHTH AMENDMENT JURISPRUDENCE AND ITS EFFECT ON DEMOCRACY

INTRODUCTION

The Supreme Court is no stranger to public scrutiny. Decisions regarding hot-button social issues, such as the validity of school prayer and the presence of religious monuments on government property, have been widely discussed in the political realm because of differing opinions as to how the Establishment Clause[1] should be interpreted.[2] Similarly, abortion, gay rights, and affirmative action are all specific issues upon which the Court's constitutional interpretations have received (and will continue to receive) significant public scrutiny. In 2005, the Court addressed another controversial topic in *Roper v. Simmons*[3]—the death penalty.

Typically, public responses to the Court's decisions regarding the death penalty and other divisive issues have focused on the substance and outcome of these cases. The general population tends to focus on the legal result of the cases rather than on the Court's reasoning and methodology. However, after the Court's decision in *Roper*, the public showed an increased interest in one particular aspect of the Court's process and methodology: the citation and influence of foreign law in interpreting the Constitution.

1. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

2. A number of recent Supreme Court cases have garnered particular attention in these and other areas. *See, e.g.*, McCreary County v. ACLU, 545 U.S. 844 (2005) (upholding an injunction barring displays of the Ten Commandments outside Kentucky courthouses due to their religious purposes); Van Orden v. Perry, 545 U.S. 677 (2005) (holding that the inscription of the Ten Commandments on a monument at the Texas State Capital did not violate the Establishment Clause); Roper v. Simmons, 543 U.S. 551 (2005) (holding that the juvenile death penalty is unconstitutional; discussed *infra* Part II.C.); Lawrence v. Texas, 539 U.S. 558 (2003) (holding that a Texas statute banning homosexual sodomy was unconstitutional due to the "emerging awareness" in society that liberty demands that adults be allowed to make personal decisions about their private sexual conduct); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that it is unconstitutional to execute the mentally retarded; discussed *infra* Part II.B.).

3. 543 U.S. 551.

The Supreme Court recently decided a number of cases which have discussed and cited foreign legal sources as authority for the majority opinion.[4] The citation of foreign law in these cases has led to a firestorm of debate and criticism about the role of these sources in constitutional law.[5] In fact, Justices Scalia and Breyer recently met at American University for a public discussion of the relevance of foreign law in the Court's decisions.[6] More recently, the citation of foreign legal sources in constitutional decisions was a partial focus in the confirmation hearings of both Chief Justice Roberts and Justice Alito.[7]

4. *See, e.g.*, *Lawrence*, 539 U.S. at 576–77; *Atkins*, 536 U.S. at 316–17 n.21.

5. *See, e.g.*, Ann Althouse, Op-Ed., *Innocence Abroad*, N.Y. TIMES, Sept. 19, 2005, at A25 (discussing the controversy over the use of foreign law and opposing Chief Justice Roberts's criticism of its use on the Court); Hadar Harris, *"We Are the World"—Or Are We? The United States' Conflicting Views on the Use of International Law and Foreign Legal Decisions*, HUM. RTS. BRIEF, Spring 2005, at 5 (arguing that the Supreme Court's use of foreign law is highly beneficial to furthering human rights in U.S. policy); Frank James, *Gonzales Raps Justices for Citing Foreign Laws*, CHI. TRIB., Nov. 9, 2005, at 13 (discussing a speech by Attorney General Alberto Gonzales explaining his opposition to the Supreme Court's reliance on foreign law in recent cases); Felix G. Rohatyn, Op-Ed., *Dead to the World*, N.Y. TIMES, Jan. 26, 2006, at A23 (criticizing Justice Alito's opposition to incorporating foreign law into the Court's decisions); Jeffrey Toobin, *Swing Shift*, NEW YORKER, Sept. 12, 2005, at 42 (exploring Justice Kennedy's reasoning for invoking foreign sources).

6. Justice Antonin Scalia & Justice Stephen Breyer, Constitutional Relevance of Foreign Court Decisions, Discussion at American University Washington College of Law (Jan. 13, 2005), *available at* http://www.wcl.american.edu/secle/ founders/2005/050113.cfm (scroll down for link to transcript).

7. During his confirmation hearings, Justice Alito discussed his opposition to the use of foreign sources in domestic Constitutional decisions:

> I don't think that we should look to foreign law to interpret our own Constitution. I agree . . . that the laws of the United States consist of the Constitution and treaties and laws, and I would add regulations that are promulgated in accordance with law. And I don't think that it's appropriate or useful to look to foreign law in interpreting the provisions of our Constitution. I think the Framers would be stunned by the idea that the Bill of Rights is to be interpreted by taking a poll of the countries of the world.

Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 471 (2006) (testimony of Samuel A. Alito, nominee for Associate Justice of the Supreme Court).

Chief Justice Roberts relayed similar sentiments at his confirmation hearing:

> [R]elying on foreign precedent doesn't confine judges. It doesn't limit their discretion the way relying on domestic precedent does. Domestic precedent can confine and shape the discretion of the judges.
>
> In foreign law you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever. As somebody said in another context, looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them, they're there. . . . It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent because they're finding precedent in foreign law, and use that to determine the meaning of the Constitution. I think that's a misuse of precedent, not a correct use of precedent.

Irrespective of the political overtones of much of the mainstream commentary on the use of foreign legal sources, there remains an important ongoing discussion about this practice in the legal field.[8] The scholarly discussion focuses on the methodology and theory underlying judicial decision-making.[9] Ultimately, the debate turns on whether foreign law has any bearing on the meaning of the United States Constitution, and whether its use has a detrimental effect on constitutional law and the integrity of the Court.

One area where the use of foreign law has been particularly apparent is in recent Eighth Amendment cases, such as *Roper v. Simmons*[10] and *Atkins v. Virginia*.[11] This Comment argues that citing foreign law as authority for interpreting the Eighth Amendment[12] undermines the American democratic process by curtailing the ability of American citizens to engage in a full discussion on the death penalty.[13] As a result, the public itself is deprived of its function as a democratic unit that can shape and develop American law.

It should be recognized at the outset that democratic discourse is limited to some extent any time the Court announces a rule of constitutional law.[14] However, the pre-emption of an issue in public discourse is different under Eighth Amendment jurisprudence because the Supreme Court follows a standard whereby the Court looks to "the evolving standards of decency that mark the progress of a maturing society" as the measuring stick for what

Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 201 (2005) (testimony of John G. Roberts, nominee for Chief Justice of the United States).

8. *See, e.g.*, John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303 (2006) (arguing that foreign law should not be cited as authority in American constitutional decisions); Diarmuid F. O'Scannlain, Judge, 9th Cir. Ct. App., What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?, Speech at the Institute of Advanced Legal Studies of the University of London (Oct. 11, 2004), *in* 80 NOTRE DAME L. REV. 1893 (2005) (suggesting that judges should recognize the usefulness of foreign law but noting that they should take a cautious approach when citing to it); Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 84–90 (2005) (suggesting that citation to foreign law is a shield for interjecting political judgments into the Court's opinions).

9. *See supra* note 8.

10. 543 U.S. 551 (2005).

11. 536 U.S. 304 (2002).

12. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

13. Most criticism of the use of foreign law in Eighth Amendment cases seems to come from individuals who are also politically and morally sympathetic to the death penalty. Insofar as this author personally finds the imposition of the death penalty morally repugnant, this Comment differs from many others. This Comment does not attack the *nature* of the results produced by the Court's decision, but rather the *flawed methodology* that achieved those results.

14. *See* WILLIAM J. QUIRK & R. RANDALL BRIDWELL, JUDICIAL DICTATORSHIP 8 (1995) (discussing Alexander Bickel's view that "[t]he Court's decision necessarily cuts off public debate and the possibility of achieving a democratic consensus.").

constitutes "cruel and unusual" punishment.[15] Because this standard takes into account *society's* notion of civilized punishment, it requires the Court to consider the state of democratic progress on that issue.[16] The standard itself requires a determination of the state of the ongoing discussion in the public sphere, as portrayed by the American people through their state legislatures. Therefore, the Court's methodology under the Eighth Amendment deserves particularly close attention to ensure that the process of judicial action does not inadvertently damage democratic ideals.

Part I begins with an explanation of democratic discourse as a "marketplace of ideas," which is integral to the democratic republic. The nature and workings of a functioning democracy are further considered in light of Jürgen Habermas's work on the subject. The role of the judiciary is considered in light of the nature of democracy and the intent of the Framers.

Part II identifies and explains constitutional decisions that have developed the standard for Eighth Amendment jurisprudence, primarily *Trop v. Dulles*,[17] *Atkins v. Virginia*,[18] and *Roper v. Simmons*.[19] The Court's opinions in these cases elucidate the debate on the appropriate role of foreign law in interpreting the Eighth Amendment.

Finally, Part III presents a discussion of the role of democracy in Eighth Amendment jurisprudence and the effect of foreign law on American society. First, the Court's growing use of foreign law in Eighth Amendment decisions is examined in order to determine the magnitude of foreign law's current effect. Second, this Comment explains that the use of foreign law has a direct impact on democracy in that it prevents Americans from engaging in a full and thorough examination of what constitutes "cruel and unusual punishment."[20] This is largely because the importance of maintaining the democratic and truth-revealing nature of the socio-political sphere in the United States is circumvented when these sources are used. This Comment also considers potential responses by the three branches of government and the public and suggests which efforts can most effectively eliminate the use of foreign law in the interpretation of the Eighth Amendment.

15. Trop v. Dulles, 356 U.S. 86, 101 (1958).

16. *See id*. at 99–100.

17. 356 U.S. 86 (1958).

18. 536 U.S. 304 (2002).

19. 543 U.S. 551 (2005).

20. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

I. DEMOCRATIC THEORY AND THE ROLE OF THE JUDICIARY

There is a justified concern that the Court's use of foreign law as authority will negatively impact American democracy. Judge Richard Posner of the Seventh Circuit expressed this concern, noting that international opinion is unrelated to our democratic institutions and has no rightful place in our jurisprudence:

> Judges in foreign countries do not have the slightest democratic legitimacy in a U.S. context. The votes of foreign electorates, the judicial confirmation procedures (if any) in foreign nations, are not events in our democracy. To cite foreign decisions in order to establish an international consensus that should have weight with U.S. courts is like subjecting legislation enacted by Congress to review by the United Nations General Assembly.[21]

In order to appreciate the current and future impact that the use of foreign law in Eighth Amendment jurisprudence can have on basic democratic principles, it is important to understand the underpinnings of democratic theory. As discussed below, one of the more recent articulations of this theory comes not from American tradition, but rather from the writings of Jürgen Habermas. Though Habermas is German, his *ideas* about democracy are not foreign to American political or judicial tradition. The following discussion provides an overview of this tradition, including a basic explanation of democratic theory from the viewpoints of many thinkers, culminating with Habermas's position. These principles explicate the interplay between democratic ideals, the Eighth Amendment, and the role of the judiciary.

A. Democracy and the "Marketplace of Ideas"

The term "marketplace of ideas" has been used for centuries as a mechanism for explaining the manner in which a free and democratic society is able to arrive at truth. Essentially, when citizens exercise speech rights, as under the First Amendment,[22] society as a whole is able to gradually develop a truthful conception of any issue.[23] The free exchange of ideas in the public sphere allows the citizenry to engage in an evolving discussion of principles until ultimately a unity of theory develops in such a way that the public at large can generally—if not unanimously—agree upon a course of action or policy.[24]

21. Posner, *supra* note 8, at 88–89.

22. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

23. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

24. *See id.*

This is often the case with the development of moral values and social change within a community, whether at the local or national level.[25]

Indeed, the Framers thought this principle of idea-exchange important enough that the United States Constitution guarantees a republican form of government to the states[26] and preserves the citizens' right to freedom of speech.[27] The interplay is apparent: preservation of public speech is necessary to ensuring a republican form of government where citizens are able to voice their opinions to elected policy makers.[28] Without this discourse, a republican form of government would lack the character of a democracy altogether.[29] Thus, the exchange of ideas in the "free market" is essential to the basic foundation of American constitutional law.

John Locke[30] thought it natural for political societies to form through the consent of individuals to be governed by the will of the majority.[31] The function of this political society, under Locke's theory, was to "unite for the mutual *Preservation* of their Lives, Liberties and Estates," or in other words, to promote the common good.[32] Although Locke did not propose a strictly

25. As noted by Jürgen Habermas, collective action against modern social problems—including women's rights, immigration, and poverty in the Third World—typically begins in the public sphere:

> Hardly any of these topics were initially brought up by exponents of the state apparatus, large organizations, or functional systems. Instead, they were broached by intellectuals, concerned citizens, radical professionals, self-proclaimed "advocates," and the like. Moving in from this outermost periphery, such issues force their way into newspapers and interested associations, clubs, professional organizations, academies, and universities. They find forums, citizen initiatives, and other platforms before they catalyze the growth of social movements and new subcultures.

JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 381 (William Rehg trans., 1996).

26. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

27. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

28. *See* THE FEDERALIST NO. 10, at 46–47 (James Madison) (Bantam ed. 1982) (explaining that in a republic, the public chooses representatives to whom the public views may be communicated).

29. *See id*. (noting the similarities and differences between a pure democracy and a republic).

30. John Locke (1632–1704) was an English political theorist and philosopher. Peter Laslett, *Introduction* to JOHN LOCKE, TWO TREATISES OF GOVERNMENT 3, 16 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

31. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 330–33 (Peter Laslett ed., Cambridge Univ. Press 1988) (1689).

32. *Id*. at 350 (emphasis in original).

> For being now in a new State, wherein he is to enjoy many Conveniences, from the labour, assistance, and society of others in the same Community, as well as protection from its whole strength; he is to part also with as much of his natural liberty in providing for himself, as the good, prosperity, and safety of the Society shall require. . . .

democratic form of political life, at least some of the Founders of our nation, such as Thomas Jefferson, were clearly influenced by Locke and recognized that the will of the majority was an integral component of a democratic society.[33]

However, there remained a fear that the majority could turn tyrannous and bend the people to its will.[34] Noting that there will always be factions in democratic governance that seek to impose their will on the populace, James Madison wrote:

> It is in vain to say, that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm: Nor, in many cases, can such an adjustment be made at all, without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another, or the good of the whole.[35]

Thus, the Federalists promoted the notion of a republican form of government instead of a pure democracy in order to ensure that the people would enjoy democratic decision-making power, while also guarding against the tyranny of the majority.[36] According to Madison, the effect of a republic is to "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country."[37]

Essentially, the Founders aimed to create a democratic republic wherein the citizens would be able to discuss policies and issues and collectively determine the best course of action.[38] Recognizing the potential for manipulation and abuse by a majority of self-interested citizens, Madison and the Federalists proposed a system of government wherein representatives would be seated to determine the course of the discussion among their constituents and speak on their behalf.[39] This view includes the notion of "the

Id. at 353.

33. *See* Laslett, *supra* note 30, at 15 (noting the "coincidence" between Locke's work and *The Declaration of Independence*, though suggesting that Locke's influence on the Founders has been overstated).

34. *See generally* THE FEDERALIST NO. 10 (James Madison), *supra* note 28.

35. *Id*. at 45.

36. *See id.* at 45–48 (describing the similarities and differences between a pure democracy and republic).

37. *Id*. at 46–47.

38. *See id.* at 46–47 (describing the ability of the public to elect representatives to whom their interests and concerns may be voiced for consideration in the governmental decision-making process).

39. *See* THE FEDERALIST NO. 10 (James Madison), *supra* note 28, at 46–47 (describing the possibility of oppression in a pure democracy and how a democratic republic can improve that process).

marketplace of ideas," wherein the citizens gather in the public sphere to develop issues in order to come to a clearer understanding of the validity and prudence of such matters.

The maintenance of this free market of ideas was further expounded upon in the writings of the English philosopher John Stuart Mill,[40] who explained the necessity of ongoing discussion for the pursuit of truth and proper governance: "We can never be sure that the opinion we are endeavoring to stifle is a false opinion; and if we were sure, stifling it would be an evil still."[41] Mill argued that the opponents of an idea cannot morally justify muting argument on a topic, because doing so essentially decides the question for everyone.[42]

> Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right.[43]

Thus, Mill argues that the majority can be tyrannical and states that free discussion of ideas in the public sphere can only lead to human development if it is not smothered by the powerful.[44] Accordingly, dissenters should not be quieted, but instead encouraged to raise their views, although unpopular, in open debate with their opponents.[45] The discussion remains vibrant in this way, and the risk of majority error is rectifiable because in the face of social error, an argument by those in dissent has the opportunity to advance and lead toward truth.[46]

In America, Justice Oliver Wendell Holmes echoed Mill's sentiments in his famous dissent from *Abrams v. United States*:

> [T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[47]

Likewise, Justice Brandeis further expounded upon the truth-finding principle of democracy in his concurrence for *Whitney v. California*:

40. John Stuart Mill (1806–1873) was an English philosopher and developer of Utilitarianism. Elizabeth Rapaport, *Introduction* to JOHN STUART MILL, ON LIBERTY vii, viii (Elizabeth Rapaport ed., Hackett Publ'g 1978) (1859).

41. JOHN STUART MILL, ON LIBERTY 16 (Elizabeth Rapaport ed., Hackett Publ'g 1978) (1859).

42. *Id*. at 16–17. "All silencing of discussion is an assumption of infallibility." *Id*. at 17.

43. *Id*. at 18.

44. *Id*.

45. *Id*.

46. MILL, *supra* note 41, at 18.

47. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form.[48]

An underlying ideal of democratic governance, which the judiciary must protect, is that society at large must be allowed to engage in a discussion of matters unfettered by the will of the powerful.

If ever a society is to arrive at actual truth, speech and participation in social discourse must be encouraged and permitted the opportunity to flourish. Dissenters ought not be silenced, because doing so creates the risk that actual truth will be buried in self-righteous certainty. To be sure, majority rule is necessary for effective governance; but in order for the nation to remain successful in the implementation of responsible policy decisions, the majority must not exert its will so as to quash the conversation at large.

B. Habermas's View of Democratic Functionality in the Public Sphere

Despite the use of democracy as a mechanism for truth, the problem exists that deliberations in the public sphere are often curtailed by majority rule.[49] Jürgen Habermas[50] advanced an explanation for this phenomenon in his work *The Structural Transformation of the Public Sphere*.[51] Although Habermas is German, his critique of this truth-finding process is supported by history and is in keeping with the American understanding of democracy. Essentially, Habermas argues that when all persons who are capable of rational discussion are invited into the public sphere, issues are widely examined by people of all backgrounds and viewpoints, and the decision-making process grows as a function of this participation.[52] This relates to Habermas's theory of

48. Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring).

49. *See supra* notes 34–37 and accompanying text.

50. Jürgen Habermas (1929–) is a German critical theorist and philosopher. Patrick Baert, *Jürgen Habermas*, *in* PROFILES IN CONTEMPORARY SOCIAL THEORY 84–86 (Anthony Elliot & Bryan S. Turner eds., 2001).

51. JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger trans., MIT Press 1991) (1962).

52. *See id*. at 3–4.

communicative action, whereby individuals in a society communicate verbally to share and debate ideas, which will be either disregarded or institutionalized into society depending on social agreement as to the rightness or wrongness of those ideas.[53] It is in this manner that a democratic society is able to pursue truth in the public sphere, a necessity for efficient and effective government by the people.

Habermas relates the success (and decline) of democratic systems through history in an effort to explain how they function. Habermas's historical account notes that democracy as it existed in Ancient Greece has been the general model for modern Western society.[54] In the Hellenic democracy, free citizens engaged directly with one another in the public sphere to better achieve an understanding of truth in the community.[55] There, topics and conflicts became thematized[56] as they were raised by the populace, and the honorable practice of debate over issues ultimately resulted in the resolution of such problems.[57] Arguments continued to develop until an argument emerged with such weight and clarity that its truth could not be denied:

> Only in the light of the public sphere did that which existed become revealed, did everything become visible to all. In the discussion among citizens issues were made topical and took on shape. In the competition among equals the best excelled and gained their essence—the immortality of fame.[58]

According to Habermas, the public sphere was largely diminished under feudalism, as the King and his administrators—as well as the Church—made decisions on the people's behalf.[59] However, the emergence of capitalism over time tended to re-open the public sphere due to the necessity of open communication for the purpose of trade in the port cities.[60] As industrial societies developed more fully, the need for the exchange of information

53. JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION VOLUME 2—SYSTEM AND LIFEWORLD: A CRITIQUE OF FUNCTIONALIST REASON 119–27 (Thomas McCarthy trans., Beacon Press 1987); *see* Mathieu Deflem, *Introduction: Law in Habermas's Theory of Communicative Action*, *in* HABERMAS, MODERNITY AND LAW 1, 3–4 (Mathieu Deflem ed., 1996).

54. HABERMAS, *supra* note 51, at 4. "Since the Renaissance this model of the Hellenic public sphere, as handed down to us in the stylized form of Greek self-interpretation, has shared with everything else considered 'classical' a peculiarly normative power. Not the social formation at its base but the ideological template itself has preserved continuity over the centuries—on the level of intellectual history." *Id.*

55. *Id.*

56. The term "thematized" is used here to refer to the process of bringing issues and topics into public discussion for analysis and examination.

57. HABERMAS, *supra* note 51, at 4.

58. *Id.*

59. *Id.* at 7–10.

60. *Id.* at 14–18.

between individuals became more pronounced, further increasing the participation of citizens in the public sphere.[61]

As the public sphere grew, the discourse naturally grew beyond matters of trade and came to involve political issues, whereby the legal landscape gradually came to sanction the public as a collective participant in the political sphere.[62] The continued development of social structures and political rights ultimately allowed further growth of the public sphere so that discourse within the socio-political environment acquired a real possibility of creating a consensus upon which effective policy measures were taken.[63]

Habermas's insight is that when discussion can continue unhindered in the public sphere in a more or less transparent and uninterrupted manner, society has the ability over time to develop that dialogue into a realization of truth or something very close to it: "The public sphere of civil society stood or fell with the principle of universal access. A public sphere from which specific groups would be *eo ipso* excluded was less than merely incomplete; it was not a public sphere at all."[64] In other words, with broad participation and a variety of viewpoints, it is more likely that an argument will develop that encompasses all facets of social reality.[65] Such an argument incorporates dynamic principles of truth and justice, and therefore has great social import.[66] In this author's estimation, it is because of this truth elucidation mechanism that representative government is a viable political option. With an open dialogue in which all citizens are capable of participating, the citizenry effectively elects those who can best relay its collective policy determinations to the nation-state and implement what, at least on a local level, becomes a consensus.

In order to truly reflect Habermasian theory, it should be noted that while Habermas remains a strong believer in democracy, his view of the modern world is not one of utopian naïveté. Habermas does not seem to believe that the public sphere fully continues to operate in an open and democratic fashion in the modern world.[67] For Habermas, free and open discussion has been replaced, at least to some extent, with mass media, which tends to dictate to the public rather than to engage members of the community in a political discussion.[68] According to Habermas, political news is watered down, and the public at large is distracted in the commercial media with sports and

61. *Id*. at 57–59.

62. *See* HABERMAS, *supra* note 51, at 83 (discussing the development of constitutional states wherein certain rights became guaranteed, thereby ensuring the existence and vitality of the public sphere as a quasi-political entity).

63. *See id*.

64. *Id*. at 85.

65. *Id*.

66. *See id*.

67. *See* HABERMAS, *supra* note 51, at 159–75, 211–22.

68. *Id*. at 163–65, 168–69.

entertainment.[69] In essence, Habermas's insight derives in part from the fact that communication has become a business wherein parties generally purchase a one-way dialogue, rarely engage in public discussion, and are bombarded with advertisements.[70] Instead of open discourse in the public sphere, political debate occurs mainly among family and friends, where participants "have a tendency to do no more than mutually confirm their ideas and at best to influence only the hesitant and less involved parties."[71]

As explained by Mathiu Deflem, Habermas's theory is that money and power steer at least some levels of democratic society, and interpersonal democracy is incapable of driving social progress alone:

> [Money and power] relieve communicative action from difficulties in reaching consensus in complex societies characterized by a range of action alternatives and, therefore, a constant threat of dissent. Actions coordinated by the steering media of money and power differ from communicative action in that they aim at the successful . . . organization of the production and exchange of goods on the basis of monetary profit (economy) and the formation of government to reach binding decisions in terms of bureaucratic efficiency (politics).[72]

Law provides a basis for institutionalizing the roles of money and power by providing legal norms that can be governmentally enforced, while democracy, though it continues, operates among smaller subsets of society.[73] Instead of a purely democratic public sphere as a means for uncovering truths for humankind, society is directed on the one hand toward personal subjective understandings of morality and personal identity, and toward the efficiency of government bureaucracies through agreed upon legal mandates on the other hand.[74]

While Habermas's analysis reveals troubling tendencies in modern democratic functionality, he does not believe that rational public deliberation has ceased altogether. Although modern political news seems to involve consumptive qualities and is at times dictated to the public, there remains in modern society the character of democratic deliberation.[75] The democratic

69. *Id*. at 169–70.

70. *Id*. at 164, 175–77.

71. *Id.* at 213.

72. Deflem, *supra* note 53, at 4–5.

73. HABERMAS, *supra* note 53, at 164–79; *see* Deflem, *supra* note 53, at 5–6. Habermas does not deny that values cannot be developed and shared by those with moral influence in the community, but he does note that such action typically is not dominant in the modern public sphere "where the influence of journalists, party leaders, intellectuals, artists, and the like is of primary importance." HABERMAS, *supra* note 53, at 275; *see also id.* at 264–82.

74. HABERMAS, *supra* note 53, at 164–79; *see* Deflem, *supra* note 53, at 6.

75. For instance, the public's engagement of political and social issues continues to occur on a regular basis via discussions in the workplace and schools, as well as through public demonstrations in cities across the country. *See* AMNESTY INTERNATIONAL USA: 2004 ANNUAL REPORT 3 (2004), *available at* http://www.amnestyusa.org/about/aiusa_annualreport.pdf

nature of American society suffers to the extent that public discussion and engagement of the issues in open forums appears to be shrinking, but that democratic nature of the republic persists nonetheless. What Habermas describes is a taint on an efficient and robust democracy. But a tainted democracy is not a rotten democracy. It would be a mistake to ignore other factors contributing to a diminished public discourse simply because of this trend. Habermas himself notes that "the players in the arena owe their influence to the approval of those in the gallery."[76] As a result, the democratic notions provided by Habermas are used in this Comment as a framework to support the claim that the use of foreign law in current Eighth Amendment decisions undermines the democratic nature of American political life.

C. The Role of the Judiciary

Unlike the Legislative and Executive Branches of government, participation in the Judiciary is an attenuated function of democratic society. Citizens have only minimal participation in the selection of federal judges, insofar as judicial philosophy and methodology may play minor roles in determining which presidential candidates receive votes.[77] That is, knowing that the executive will make determinations about what kind of judges will be

(explaining the national involvement of over 330,000 individuals and nearly 200,000 student groups in its human rights activism and awareness programs); Michelle Boorstein, *Protestors See Mood Shift Against 'Roe'*, WASH. POST, Jan. 24, 2006, at A3 (reporting on an early-2006 pro-life protest in Washington, D.C. attended by thousands); Darryl Fears & Krissah Williams, *Immigrant Rallies Have Mixed Impact*, WASH. POST, May 7, 2006, at A3 (discussing opposition to illegal immigration in response to large rallies in support of immigrants); Evelyn Nieves, *Groups Preparing New Push Against Iraq War; Invasion Anniversary Next Month is Date of Campaign Kickoff*, WASH. POST, Feb. 18, 2005, at A3 (discussing the growing protest activity of citizens opposed to U.S. military activity in Iraq); Antonio Olivo & Oscar Avila, *United They March: Hundreds of Thousands Rally for Immigration Rights*, CHI. TRIB., May 2, 2006, at C1 (describing collective action of protestors in Chicago and other U.S. cities in support of immigrant concerns); Robert Pear, *Rally Near White House Protests Violence in Mideast*, N.Y. TIMES, Aug. 13, 2006, at 22 (recounting a large protest in Washington, D.C. against American support for Israeli military operations in Lebanon); Robin Tower, *A Gay Rights Rally Over Gains and Goals*, N.Y. TIMES, May 1, 2000, at A14 (reporting on the efforts of activists to promote awareness of gay rights issues and to work toward the advancement of homosexuals in America). Moreover, the engagement of American citizens in the political process as voters has remained steady, if not increasing in recent years. *See generally* Michael P. McDonald & Samuel L. Popkin, *The Myth of the Vanishing Voter*, 95 AM. POL. SCI. REV. 963 (2001) (presenting data indicating that the turnout of eligible voters has fluctuated since the 1970s but has not decreased); *see also* Juan Salgado, Letter to the Editor, *Voter Registration Increase*, CHI. SUN-TIMES, Sept. 15, 2006, at 38 (celebrating the growing desire of Chicago's immigrant population to participate in the political process).

76. HABERMAS, *supra* note 25, at 382.

77. *See* LESLIE FRIEDMAN GOLDSTEIN, IN DEFENSE OF THE TEXT: DEMOCRACY AND CONSTITUTIONAL THEORY 139 (1991) (noting that if Court decisions prove unpopular, elections may be influenced by the potential for Supreme Court appointments).

appointed, the public accounts for the Judicial Branch to some extent when casting its votes for President at the ballot box.[78] However, it seems unlikely that many citizens are overly concerned with judicial appointments in anything other than the immediate. Thus, if the Judiciary is to have any democratic function, it must be in the protection of the underlying principles that ensure democratic vitality in the public sphere. In this way, the role of the Judicial Branch serves an important democratic principle.

"It is emphatically the province and duty of the judicial department to [s]ay what the law is."[79] The thrust of this oft-quoted statement embodies concepts central to the role of the Court. First, the Court is the ultimate authority of constitutional claims, beyond which there is no judicial appeal.[80] Thus, the force of an opinion by the Supreme Court generally determines the course of constitutional law on a specific issue for years to come.[81] Second, the statement, when considered in light of the Supremacy Clause,[82] includes an implicit and logical assertion that the Court is expounding the law of *America*. In other words, the Court determines the state of American law, derived from

78. *Id*.

79. Marbury v. Madison, 5 U.S. 137, 177 (1803).

80. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."); *see* THE FEDERALIST NO. 81, at 408 (Alexander Hamilton) (Bantam ed. 1982) ("That there ought to be one court of supreme and final jurisdiction is a proposition which has not been, and is not likely to be contested.").

81. Of course, it is possible that Congress can overturn the Court's decisions via constitutional amendments:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .

U.S. CONST. art. V. Likewise, under certain circumstances, Congress has the power to impeach and remove Supreme Court Justices. U.S. CONST. art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."). However, amendments are rare—only four times has Congress amended the Constitution in order to alter a Supreme Court decision. *See* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 776 (1991). Additionally, Justice Samuel Chase, the only Supreme Court Justice to have ever been impeached, was neither convicted of any crime nor removed from office. Steven W. Fitschen, *Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny*, 10 REGENT U. L. REV. 111, 139 (1998).

82. U.S. CONST. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

the Constitution and American traditions, and ultimately, the American people, in the form of statutory law.[83]

Chief Justice John Marshall recognized this limitation on government and the Court in 1812 when discerning the limits of American legal power over other nations:

> The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent, of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.
>
> This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.[84]

While Chief Justice Marshall was referring to the limits on the exercise of American power over other nations, the logic of the rule is reciprocal. It is an illegitimate exercise of government to permit foreign influence over the laws and practices of the American court system because the exercise of foreign authority does not arise from popular consent.

Indeed, as Chief Justice Rehnquist noted in his dissent in *Atkins v. Virginia*, it is the legislature that must respond to the will and morality of the public.[85] The Court should, as much as possible, ensure that its decisions do not "cut off the normal democratic processes."[86] Likewise, Alexander Hamilton noted the derivation of the Constitution from the American people and the importance of the preservation of that democratic will in *The Federalist No. 78*:

> [This conclusion] only supposes that the power of the people is superior to both [the judicial and legislative powers]; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people

83. The Framers indicated that the Court ought to defer to the will of the people:

> It can be of no weight to say, that the courts on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. . . . The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.

THE FEDERALIST NO. 78, at 396 (Alexander Hamilton) (Bantam ed. 1982).

84. The Schooner Exchange v. McFaddon, 11 U.S. 116, 136 (1812).

85. Atkins v. Virginia, 536 U.S. 304, 323 (2002) (Rehnquist, C.J., dissenting).

86. *Id.*

> declared in the constitution, the judges ought to be governed by the latter, rather than the former.[87]

In the interest of ensuring the preservation of the democratic process, the Court's role should be confined to determining the law for Americans insofar as Americans have constructed that law—whether it be from the Framers' original intent, through constitutional amendment, statutory authority, or through narrow judicially-created precedent tailored to take American mores and practices into account. As Justice Scalia warned in *Thompson v. Oklahoma*, "We must never forget that it is a Constitution for the United States of America that we are expounding."[88]

A logical conclusion from this reasoning, therefore, is that when consensus-based precedents for determining the meaning of the Constitution are employed, such as in Eighth Amendment jurisprudence, the Court must ensure that its decisions preserve the democratic function of the citizenry to whatever extent possible. In order to understand how democratic ideals can best be considered and promoted by the Court, it is important to analyze the methods from which such interpretations are derived. Part II provides an overview of the Court's recent methodology with regard to the Eighth Amendment.

II. THE DISPUTE OVER FOREIGN LAW IN EIGHTH AMENDMENT CASES

In light of the philosophical and political thought that created and shaped American democracy, constitutional case law has led and defined the recent increase in debate over the use of foreign law in constitutional interpretation.[89] Specifically, the Eighth Amendment is directly linked to democratic principles by the Court's invocation of a standard that requires an analysis of the state of social discourse as to what constitutes "cruel and unusual punishment."[90] Increasingly, the Supreme Court has considered and cited foreign law as a source of authority in its Eighth Amendment jurisprudence.[91] The following discussion provides a brief overview of the Court's Eighth Amendment standard and the recent increase in the use of foreign decisions in its analysis.

A. Trop v. Dulles *and the "Evolving Standards of Decency"*

Trop v. Dulles[92] set the standard by which "cruel and unusual punishment" is examined by the Supreme Court. In *Trop*, the Court was asked to rule on the

87. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 83, at 395–96.

88. Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (Scalia, J., dissenting).

89. *See, e.g.*, *supra* notes 4–5.

90. Trop v. Dulles, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

91. *See generally infra* Part II.

92. 356 U.S. 86 (1958).

constitutionality of a section of the Nationality Act of 1940[93] that imposed loss of citizenship as punishment for desertion by a soldier during wartime.[94] Albert Trop, a soldier stationed in Morocco during World War II, escaped from a stockade where he had been confined for misconduct.[95] Trop was later apprehended, court-martialed, convicted of desertion, and dishonorably discharged.[96] His conviction also required a revocation of his citizenship under the Nationality Act.[97] In an attempt to retain his citizenship, Trop sued the U.S. government.[98]

One question before the Court was whether the revocation of a soldier's citizenship for Army desertion constituted cruel and unusual punishment within the meaning of the Eighth Amendment.[99] Writing for a 5-4 majority, Chief Justice Warren stated that the Eighth Amendment guarantees that a citizen's punishment will be governed "by the principle of civilized treatment"[100] and embodies the basic principle that the government must respect the dignity of persons by punishing criminals according to civilized standards.[101] Ultimately, the Court determined that "The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[102] Within this framework, the Court held that the revocation of citizenship for desertion constituted cruel and unusual punishment.[103]

93. 54 Stat. 1137, 1168–69 (1940), *amended by* 58 Stat. 4 (codified as amended at 8 U.S.C. § 1481(a)(8) (1952)).

> (a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—
>
> . . .
>
> (8) deserting the military, air, or naval forces of the United States in time of war, if and when he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military, air, or naval forces: *Provided*, That, notwithstanding loss of nationality or citizenship under the terms of this chapter or previous laws by reason of desertion committed in time of war, restoration to active duty with such military, air, or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military, air, or naval authority shall be deemed to have the immediate effect of restoring such nationality or citizenship heretofore or hereafter so lost . . . .

Id.

94. *Trop*, 356 U.S. at 87.
95. *Id.*
96. *Id.* at 88.
97. *Id.*
98. *Id.*
99. *Trop*, 356 U.S. at 99.
100. *Id.*
101. *Id.* at 100.
102. *Id.* at 101.
103. *Id.*

In making this determination, the Court looked to the nature of the punishment and the nature of the political structure within which human beings live.[104] Interestingly, the Court briefly noted within the actual text of the opinion that only two other nations in the world imposed denationalization as a punishment for military desertion.[105] It is not clear to what extent the Court relied upon this fact to determine whether the Nationality Act comported with the "evolving standards of decency . . . of a maturing society," although it appears that it had a "confirmatory role" in the Court's analysis.[106] Nonetheless, the presence of foreign law in *Trop* is noteworthy in that future cases mirrored the format.

Interestingly, the dissenting opinion in *Trop* made no criticism of the majority's use of foreign law whatsoever.[107] In fact, Justice Frankfurter's dissent actually invoked the use of foreign law to support his own position.[108] If nothing else, the Court's use of foreign law in *Trop* opened the door for its citation in future opinions. Ultimately, however, the repeated citation of foreign sources in the interpretation of the Eighth Amendment has created an ongoing disagreement between various Justices on its relevance to constitutional interpretation.

B. The Road to Roper v. Simmons

After *Trop* set the standard by which "cruel and unusual punishment" would be determined in Eighth Amendment jurisprudence, the Court decided a string of opinions over the next half-century that primarily relied on domestic law and changes in American society.[109] Nonetheless, the Court's continued invocation of foreign legal sources as a point of reference for constitutional interpretation is apparent in these cases.

For instance, in 1977, the Court held in *Coker v. Georgia*[110] that the death penalty could not be instituted as a punishment for rape because this practice was proscribed by the Eighth Amendment's guarantee against "cruel and unusual punishment."[111] There, the Court primarily focused on the proportionality of the offense to the punishment and the small number of states that allowed the death penalty for the offense of rape.[112] However, the Court

104. *Trop*, 356 U.S. at 101–03.

105. *Id*. at 103. These nations were the Philippines and Turkey. *Id*.

106. *Id*. at 101.

107. *See id.* at 114–28 (Frankfurter, J., dissenting).

108. *Id*. at 126.

109. *E.g.*, Atkins v. Virginia, 536 U.S. 304 (2002); Stanford v. Kentucky, 492 U.S. 361 (1989); Thompson v. Oklahoma, 487 U.S. 815 (1988); Enmund v. Florida, 458 U.S. 782 (1982); Coker v. Georgia, 433 U.S. 584 (1977).

110. 433 U.S. 584.

111. *Id*. at 592.

112. *Id*. at 593.

briefly appealed to foreign law and international opinion in a short footnote, stating that only three major nations allowed the death penalty for rape.[113] In fact, the Court explicitly stated that international opinion was "not irrelevant" in determining the civility of the punishment under the Eighth Amendment.[114]

Likewise, in 1982, the Court limited its use of foreign law to a footnote in *Enmund v. Florida*,[115] where the Court held that the imposition of felony murder did not comport with the standards of the Eighth Amendment, absent a specific finding that the defendant intended to kill.[116] Pointing to such nations as Canada, England, and India, the Court noted that its decision in *Enmund* was consistent with the views of the world community.[117]

Foreign views on Eighth Amendment issues did not resurface in the actual text of a Supreme Court opinion until 1988 when *Thompson v. Oklahoma*[118] was decided. In *Thompson*, the Court found that the imposition of the death penalty against murderers under the age of sixteen was inconsistent with the "evolving standards of decency that mark the progress of a maturing society."[119] Writing for a 5-3 majority,[120] Justice Stevens stated that this holding was "consistent with the views that have been expressed by . . . other nations that share our Anglo-American heritage, and by the leading members of the Western European community."[121] To further support the Court's holding, Justice Stevens then listed multiple nations that had either restricted the use of the death penalty to adults or banned the death penalty entirely.[122]

For the first time, *Thompson* also included a short reproach of the majority's use of foreign law, albeit only in a footnote.[123] In dissent, Justice Scalia argued that foreign law is an inappropriate tool for determining the

113. *Id*. at 596 n.10. As in *Trop v. Dulles*, the dissent in *Coker* made no objection to the use of foreign sources. *Id*. at 604–22 (Burger, J., dissenting).

114. *Id*. at 596 n.10 (majority opinion).

115. 458 U.S. 782, 796 n.22 (1982).

116. *Id*. at 782.

117. *Id*. at 796 n.22. Yet again, the dissent made no criticism of the majority's use of foreign law in Eighth Amendment jurisprudence. *Id*. at 801–31 (O'Connor, J., dissenting).

118. 487 U.S. 815 (1988).

119. *Id*. at 821–23.

120. Justice Kennedy did not participate in the opinion. *Id*. at 815.

121. *Id*. at 830.

122. *Id*. at 830–31.

> Although the death penalty has not been entirely abolished in the United Kingdom or New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed. The death penalty has been abolished in West Germany, France, Portugal, the Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland. Juvenile executions are also prohibited in the Soviet Union.

Id.

123. *Thompson*, 487 U.S. at 868–69 n.4 (Scalia, J., dissenting).

meaning of the U.S. Constitution and that domestic law is determinative in constitutional decisions,

> even if that position contradicts the uniform view of the rest of the world. We must never forget that it is a Constitution for the United States of America that we are expounding. . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.[124]

After his dissent in *Thompson*, Justice Scalia became the most vocal critic of the use of foreign law in constitutional decision-making.[125] This characteristic became apparent in *Stanford v. Kentucky*, where Justice Scalia wrote for the majority in a 5-4 opinion declaring that the execution of sixteen- and seventeen-year-old murderers did not violate the Eighth Amendment.[126] While Justice Scalia did not attack the use of foreign sources directly in the actual text of the opinion, in discussing the application of the *Trop* standard, he asserted that the Court must look to the conceptions of decency held by modern *American* society.[127] Nonetheless, his opposition to the use of foreign materials was again made clear in a footnote:

> We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners . . . that the sentencing practices of other countries are relevant. . . . "[T]he practices of other nations" . . . cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.[128]

124. *Id*.

125. Justice Scalia's view of the issue pertains not only to Eighth Amendment decisions, but also to any citation of foreign law when interpreting the meaning of the Constitution. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (arguing that new constitutional rights do not suddenly appear in the Constitution simply because foreign countries have felt differently about the issue and calling the majority's use of foreign law "meaningless" and "dangerous"); *see also* Antonin Scalia, Commentary at the Conference of Supreme Courts of the Americas (Oct. 1995), *in* 40 ST. LOUIS U. L.J. 1119, 1119, 1121 (1996) (arguing that foreign and international law is to be cited by the Court only where the "customary usages of international affairs" are involved, and those usages do not contradict American law); Scalia & Breyer, *supra* note 6 (where Justice Scalia criticized the use of foreign law as a mechanism for manipulation whereby judges can impose their personal beliefs on the nation by appealing to whatever sources agree with them).

126. Stanford v. Kentucky, 492 U.S. 361 (1989).

127. *Id*. at 369.

128. *Id*. at 369 n.1 (emphasis in original, citation omitted). Interestingly, Justice Kennedy joined Justice Scalia's opinion, despite the fact that he would become one of the most outspoken advocates of using foreign law after writing the opinions in both *Lawrence v. Texas* and *Roper v. Simmons*. *See* Toobin, *supra* note 5 (examining Justice Kennedy's interest in foreign law and the backlash he has received for citing it in his opinions).

While Justice Scalia denounced the use of foreign law, the citation of which had gone uncontested until *Thompson*, Justice Brennan's dissent attacked the position of the majority on this issue.[129] Noting that a number of previous Eighth Amendment cases looked beyond American borders, the dissent relayed statistics in support of the assertion that the world community rejected the use of the death penalty for crimes committed by juvenile offenders.[130]

The debate became more pronounced in 2002 with *Atkins v. Virginia*, where the Court held that the Eighth Amendment barred the execution of the mentally retarded.[131] Once again, the majority confined its use of foreign and international opinion to a footnote, rather than including it in the text of the opinion.[132] Although conceding that global opinion was not dispositive, the majority stated that the world's overwhelming disapproval of imposing the death penalty on the mentally retarded bolstered support for the Court's holding.[133]

Both Chief Justice Rehnquist and Justice Scalia wrote dissenting opinions that attacked the majority's invocation of international sources.[134] The Chief Justice noted that the Court had denounced the use of these sources in *Stanford*, writing: "I fail to see . . . how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination. . . . For if it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries simply are not relevant."[135] Justice Scalia reiterated this sentiment, suggesting that the majority had fabricated a national consensus in part through its use of foreign law.[136] "[I]rrelevant are the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people."[137]

C. The Expansion of Foreign Influence in Roper v. Simmons

Although the use of foreign law in Eighth Amendment decisions started quietly in *Trop*, the division on the Court became clearer when Justice Kennedy invoked foreign legal sources as authority for the majority opinion in *Roper v. Simmons*.[138] Justice Kennedy's discussion in *Roper* represents the

129. *Stanford*, 492 U.S at 382–405 (Brennan, J., dissenting).
130. *Id*. at 389–90.
131. Atkins v. Virginia, 536 U.S. 304 (2002).
132. *Id*. at 316 n.21.
133. *Id*.
134. *Id.* at 321–28 (Rehnquist, C.J., dissenting); *id*. at 337–54 (Scalia, J., dissenting).
135. *Id*. at 324–25 (Rehnquist, C.J., dissenting) (emphasis in original).
136. *Atkins*, 536 U.S. at 347 (Scalia, J., dissenting).
137. *Id*. at 347–48.
138. 543 U.S. 551 (2005).

most extensive and pronounced use of foreign sources in the actual text of any Eighth Amendment decision.

In *Roper*, the defendant, Christopher Simmons, was seventeen years old when he and two cohorts planned and committed burglary and a gruesome murder.[139] While planning the crime, Simmons told his friends that they would be able to get away with the crime due to their age.[140] At trial, Simmons was convicted of murder and sentenced to death.[141] On state collateral appeal, the Missouri Supreme Court agreed with Simmons that the Eighth Amendment bars the imposition of a death sentence against a juvenile murderer.[142]

The United States Supreme Court granted certiorari in the case and affirmed the Missouri decision in *Roper v. Simmons*.[143] Writing for the majority, Justice Kennedy argued under the *Trop* rule that the standards of decency in society had evolved so as to make the implementation of the death penalty against minors cruel and unusual under the Eighth Amendment.[144] While engaging in this process, the Court focused primarily on a perceived consistent movement among the states away from the use of the juvenile death penalty.[145]

However, the Court did not limit its efforts to the practices of the states. Justice Kennedy specifically set aside a separate discussion in its own section of the opinion to argue that the unconstitutionality of the juvenile death penalty was confirmed by "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."[146] By contrasting the practices and standards of the United States with that of other countries, the Court found that the "overwhelming weight of international opinion against the juvenile death penalty . . . provide[s] respected and significant confirmation" for the decision that the juvenile death penalty constitutes cruel and unusual punishment.[147]

139. *Id*. at 556–57.

140. *Id*. at 556.

141. *Id*. at 558.

142. State *ex rel.* Simmons v. Roper, 112 S.W.3d 397 (2003). The Missouri Supreme Court stated that despite the holding in *Stanford*, a national consensus disapproving of the execution of juvenile offenders had since developed. *Id*. at 399. The court also noted that "the views of the international community have consistently grown in opposition to the death penalty for juveniles." *Id.* at 411.

143. *Roper*, 543 U.S. at 551.

144. *Id*. at 564–67.

145. *Id*. at 564–75.

146. *Id*. at 575.

147. *Id*. at 578.

The Court's analysis accounted for the fact that only eight nations had exercised the death penalty against a juvenile since 1990.[148] Of these, the Court emphasized that every nation except the United States had either banned the death penalty for juveniles or shown disapproval for such executions.[149] The Court remarked: "In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty."[150] The majority defended its use of foreign law, noting that while global normative practices and opinions were not dispositive, they did play an important confirmatory role in the Court's decision.[151]

Justice O'Connor dissented in *Roper*, finding that there was no domestic consensus against the juvenile death penalty, but agreed that the Court's use of foreign materials served a confirmatory role in Eighth Amendment analysis.[152] Noting that the Court regularly included references to foreign opinion in Eighth Amendment decisions, Justice O'Connor wrote:

> This inquiry reflects the special character of the Eighth Amendment, which, as the Court has long held, draws its meaning directly from the maturing values of civilized society. . . . [T]his Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries.[153]

Despite her defense of the use of foreign sources, Justice O'Connor acknowledged that the only role foreign opinion can play in Eighth Amendment jurisprudence is a confirmatory one.[154]

Justice Scalia, on the other hand, provided a scathing dissent criticizing the Court's holding and the majority's reliance on foreign legal sources.[155] Noting that foreign opinion is not binding on the Court, Justice Scalia argued that "the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."[156] The dissent argued that no justification could be found for the inclusion of foreign law in the reasoned opinion of a constitutional issue.[157] Justice Scalia argued

148. *Roper*, 543 U.S. at 577. The nations cited by the Court were: China, the Democratic Republic of the Congo, Iran, Nigeria, Pakistan, Saudi Arabia, the United States, and Yemen. *Id*.

149. *Id*.

150. *Id*.

151. *Id*. at 578. "It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." *Id*.

152. *Id*. at 604–05 (O'Connor, J., dissenting).

153. *Roper*, 543 U.S. at 604–05.

154. *Id*.

155. *See id*. at 607–30 (Scalia, J., dissenting).

156. *Id*. at 624.

157. *Id*.

that this view, similarly expressed in *Stanford*, *Lawrence*, and *Atkins*, remained valid even in light of *Trop*.[158]

Essentially, the dissent viewed the Court's opinion as disregarding the reality of the domestic attitude about the juvenile death penalty[159] and accused the majority of casting its members' own personal views about the juvenile death penalty into the law by means of foreign legal sources.[160]

> To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry. . . . What these foreign sources "affirm," rather than repudiate, is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America. . . . "Acknowledgement" of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court's judgment*—which is surely what it parades as today.[161]

Thus, Justice Scalia was not only unconvinced that foreign law should play a role in Eighth Amendment jurisprudence, he was also unimpressed with what he viewed as the majority's inclusion of such materials under the guise of a merely confirmatory role.[162]

Of course, the portion of Justice Scalia's statement that guesses at the motives of his fellow Justices is outside the focus of this Comment. However, Justice Scalia's conclusion that foreign law must have played some role in the decision is certainly relevant here.[163] Professor Ernest Young argues persuasively that the finding of a national consensus against the juvenile death penalty in *Roper* was dubious and that the Court included international opinion as part of the consensus-building pool to make its holding persuasive.[164] As a

158. *Roper*, 543 U.S. at 611–14, 621.

159. *Id*. at 622. "Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and their so-called international community take center stage." *Id.*

160. *Id*. at 628.

161. *Id*. at 627–28 (emphasis in original).

162. *Id*.

163. The *Roper* majority did not deny this point, but instead attempted to marginalize its importance by referring to its use of foreign sources as merely confirmatory. *See Roper*, 543 U.S. at 578 (majority opinion) ("The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."). Though dissenting, Justice O'Connor supported the use of foreign law in a confirmatory role. *Id*. at 605 (O'Connor dissenting) ("At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus. The instant case presents no such domestic consensus, however, and the recent emergence of an otherwise global consensus does not alter that basic fact.").

164. Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005).

> Including foreign practice shifts the question from whether places like Texas and Missouri—states maintaining the juvenile death penalty—are unusual out of the fifty-one American jurisdictions, to whether those states are unusual considered against the world

result, this Comment joins the recognition that the Court did rely on foreign sources and argues that in its reliance on these sources, the Court's decision damaged democratic discourse.

III. THE USE OF FOREIGN LAW IN EIGHTH AMENDMENT DECISIONS UNDERMINES THE DEMOCRATIC PROCESS

As one might expect, the dialogue between the Justices in these cases has fueled the recent explosion of debate regarding the place of foreign law in the Court's decisions.[165] So far, whenever the Court has invoked foreign opinion in its reasoning, it has taken time to note that the use of these sources is not dispositive.[166] However, the Court's language walks a shaky line between mere "confirmatory" use of foreign laws and actual persuasive value. Thus, Justice Scalia's discussion of the use of these sources raises valid concerns, and Americans have started to pay attention. In keeping with this recent upsurge of interest in the role of foreign sources, this Comment argues that the use of foreign sources in Eighth Amendment decisions undermines important and necessary democratic principles.

As previously noted, whenever the Court makes a determination on a legal issue, the holding curtails discussion of that issue in the public sphere to some extent.[167] This is much more the case when the Court hands down constitutional prohibitions. For instance, with the decision to ban the juvenile death penalty in *Roper*, the Court effectively removed any substantive discussion of the juvenile death penalty from the public sphere. Debating and

> as a whole (or perhaps some subset of countries with values similar to our own). The foreign jurisdictions, in other words, swell the denominator against which the set of jurisdictions retaining the benighted practice is measured.
>
> The point of swelling the denominator is that it is not big enough without these foreign practices. . . . Such an even split [among Americans] hardly fits the common understanding of "consensus" as "[g]eneral agreement or concord" or "the collective unanimous opinion of a number of persons." This substantial minority position on the domestic plane becomes an aberrational practice, however, when judged against the backdrop of world opinion.

Id. at 153–54.

165. *See supra* notes 5, 6, and 8 and accompanying text.

166. *See Roper*, 543 U.S. at 575–78 (majority opinion) (calling foreign opinion "not controlling" but "instructive" authority that provides "respected and significant confirmation"); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (stating that foreign sources "are by no means dispositive, [but] their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue."). *But see* Stanford v. Kentucky, 492 U.S. 361, 389 (1989) (Brennan, J., dissenting) ("Our cases recognize that objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis.").

167. *See* QUIRK & BRIDWELL, *supra* note 14, at 8 (discussing Alexander Bickel's view that "[t]he Court's decision necessarily cuts off public debate and the possibility of achieving a democratic consensus.").

exploring the issue among opposing viewpoints is futile because the Court has determined the policy issue once and for all.

The Court's decision in *Roper* is a one-way ratchet—there will be no more hopeful debates about the truth of the juvenile death penalty because the Court has already made a final determination. Even if there is a sudden influx of seventeen-year-old murderers and citizens would prefer to re-impose the death penalty, the states would be powerless to do so in the face of *Roper*. In fact, some states apparently do prefer to allow the death penalty as an option for minors, as twenty states allowed juvenile executions at the time of *Roper*.[168] However, while disagreement on the issue remains, proponents and opponents of the ban have little or no incentive to continue discussing the matter in the public sphere.

With discussion of the merits of retaining the juvenile death penalty removed from the public sphere, opponents of the ruling have nowhere to take their position, and engagement of the issue can no longer occur on a significant level. Most disturbing is the recognition that to the extent that foreign opinion contributed to this determination, the American public has been deprived of the ability to better itself with a thoughtful and thorough engagement of the issue.[169]

This point may initially seem overblown, but a closer look indicates that constitutional decisions influenced in whole or in part by foreign legal sources deprive American society of the possibility of resolving the issue by developing a real consensus on truth. Even if the juvenile death penalty is just, society is deprived of the opportunity to arrive at this understanding, thereby bypassing an important principle embodied in the Judicial Branch itself—a full and proper understanding of justice. Conversely, even if the juvenile death penalty is unjust, pre-emption of that discussion hinders social progress by circumventing American citizens' recognition of that fact.[170] Whereas Mill and Habermas argue that, over time, an argument should mature in such a way that the weight of one position so clearly refutes the other that it becomes accepted, this process cannot occur when the topic is de-thematized.

168. *Roper*, 543 U.S. at 564. The Court noted that the same calculation existed in *Atkins v. Virginia*, although the trend towards abolition of the death penalty for the mentally retarded was substantially more extreme than for the juvenile death penalty. *Id.*

169. The deprivation of the ability to better ourselves derives from the notion that it is more beneficial if society actually agrees that the juvenile death penalty is wrong than if the Court bars the death penalty's imposition while a large percentage of the population still supports it.

170. Of course, this assumes that the morality of the juvenile death penalty remains an open question. While convincing arguments can be made that the juvenile death penalty is morally illegitimate, for the purposes of this Comment, it is sufficient to note that the question remains an open one in American society. At the time of *Roper*, twenty of thirty-eight states that employed the death penalty also retained the juvenile death penalty. *Roper*, 543 U.S. at 564.

A. The Growth and Nature of Foreign Law's Influence in Eighth Amendment Jurisprudence

One important question is to what extent the Court actually relies on foreign law in its decisions. The Court has repeatedly asserted that foreign law merely plays a confirmatory role in its decisions and is not treated as binding authority.[171] However, the recent expansion of the use of these sources indicates that foreign law may play a greater role than some claim. In *Trop*, the discussion was limited to a short paragraph.[172] *Coker*[173] and *Enmund*[174] both limited the discussion to footnotes, and *Thompson*'s discussion of foreign sources was confined to a brief paragraph.[175] Even Justice Scalia's majority opinion in *Stanford* limited its criticism of foreign opinion as a resource for constitutional interpretation to a footnote.[176]

In *Roper v. Simmons*, however, the Court painstakingly recounted the state of foreign law on the juvenile death penalty over three pages in a section separate from the rest of the opinion.[177] This considerable expansion appears indicative of a greater willingness by the Court to use foreign law as a determinative factor, rather than merely confining it to a confirmatory role as the *Roper* majority claimed.[178] This appearance is not merely a function of the length of the Court's treatment; the discussion in *Roper* is the most thorough, considered, and serious examination of foreign law in any Eighth Amendment case.[179]

What seems somewhat paradoxical is why the Court cites these sources at all if they carry no actual weight in its decision. In fact, Justice Scalia raised this very point in a debate with Justice Breyer in early 2005.[180] Showing concern for what he sees as selective citation of foreign law by certain Justices only when it agrees with their personal views, Justice Scalia stated:

> Do you want it to be authoritative? I doubt whether anybody would say, "Yes, we want to be governed by the views of foreigners." Well if you don't want it

171. *See, e.g.*, *Roper*, 543 U.S. at 578 ("The opinion of the world community, *while not controlling our outcome*, does provide respected and significant confirmation for our own conclusions.") (emphasis added).

172. Trop v. Dulles, 356 U.S. 86, 102–03 (1958).

173. Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977).

174. Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982).

175. Thompson v. Oklahoma, 487 U.S. 815, 830–31 (1988).

176. Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989).

177. Roper v. Simmons, 543 U.S. 551, 575–78 (2005).

178. Consistent with this pattern is the considerable length of discussion given to foreign sources by the majority in *Lawrence v. Texas*, 539 U.S. 558 (2003).

179. *See Roper*, 543 U.S. at 575–78.

180. Scalia & Breyer, *supra* note 6.

> to be authoritative, then what is the criterion for citing it [or] not? That it agrees with you? I don't know any other criterion to bring forward.[181]

Justice Breyer responded to the criticism by noting that while foreign opinions are not binding, judges in other nations have dealt with similar questions of law, and American judges can learn about the U.S. Constitution by reading their opinions.[182] Even so, the actual discussion and citation of foreign law in the decisions tends to indicate that these sources hold some perceived authority beyond mere confirmatory or informative value. Thus, while the growing use of foreign legal sources in Supreme Court decisions does not certainly indicate that the Court is using foreign law as a *determinative* factor—after all, the opinions do provide at least some domestic support for their holdings in all of these cases—the growing presence of foreign sources does create the impression that the Court finds them instructive and accords some weight to them.

Nonetheless, a number of scholars have found the "confirmatory role" explanation persuasive. For instance, Professor Vicki Jackson argues that foreign law has played such a role since at least 1879.[183] She suggests that in referencing foreign sources, jurists

> do not treat foreign or international material as binding, or as presumptively to be followed. But neither do they put on blinders that exclude foreign legal sources and experience. Transnational sources are seen as interlocutors, offering a way of testing understanding of one's own traditions and possibilities by examining them in the reflections of others'.[184]

181. *Id*.

182. *Id*. Professor Young does not think the decision in *Roper* reflects Justice Breyer's interest in learning from other judges, because the Court simply counted foreign jurisdictions that barred the juvenile death penalty; the Court did not investigate the rationales behind these decisions in any foreign jurisdiction. Young, *supra* note 164, at 152, 155.

> The Court might feel strongly based on its own moral reasoning, that the juvenile death penalty is immoral but be unwilling to override democratic processes unless it finds its intuitions shared by a large majority of respected legislators and jurists. This majority does not exist, of course, until the foreign jurisdictions are counted. Foreign practice thus "persuades" the Court, but it is persuasion of a particular kind. The Court is not persuaded by new rationales, but rather by the mere fact that foreign jurisdictions take a particular view. It has not "learned" anything from looking abroad other than to find out that others agree with what the Court already believed. It is deferring to numbers, not reasons.

Id. at 155.

183. Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005).

184. *Id*. at 114.

According to Professor Jackson, consideration of foreign legal materials in an "interlocutory framework" merely "prompt[s] deeper reflection on whether current interpretations live up to our own constitutional commitments."[185]

Despite this noble model of comparative constitutional analysis, Professor Jackson's view appears to treat this approach as truth-neutral—an analysis that occurs "without a thumb on the scale in either direction, permitting more differentiated influences . . . in an interlocutory framework."[186] However, Professor Jackson fails to note that all relevant information has some persuasive value, and the examination and use of such information necessarily do lead toward one direction or another. This is the nature of information sharing—examination of other possibilities and viewpoints requires one to be self-critical of one's own position. This process necessarily involves the prospect of persuasion. For this reason, the Court's thorough examination of foreign law in cases such as *Roper* appears to include a persuasive component.

When a court engages in a "confirmatory" analysis under the Eighth Amendment, it essentially asks: "Are we right about this moral judgment?" The argument made in this Comment is that in doing so courts ask an unnecessary and inappropriate question. Courts applying the *Trop* standard should ask: "What moral judgment has a consensus of Americans reached?" This is the extent of the constitutional inquiry. A court's analysis of foreign law is unnecessary because such an analysis has nothing to do with the national consensus. It is improper because, by its inquiry into foreign law, a court abandons its role as an arbiter of the law and becomes an arbiter of morality. Such judgments should be left up to the democratic process, which is fully capable of placing moral norms into a legal framework via the Legislative and Executive Branches. The next section explains how the inclusion of foreign legal materials as persuasive authority in constitutional law prevents robust democratic development.

B. The Use of Foreign Law as a Mechanism to Circumvent the Democratic Process

As it is the role of judges is to ensure that the laws of the United States comply with the Constitution, it is logical to conclude that constitutional decisions are domestic concerns with legal implications for the citizens of the United States, who are granted rights by that document. As exemplified by the line of Eighth Amendment cases discussed above, the Court's ability to define

185. *Id*. at 127; *see also* Yitzchok Segal, Comment, *The Death Penalty and the Debate Over the U.S. Supreme Court's Citation of Foreign and International Law*, 33 FORDHAM URB. L.J. 1421, 1432, 1442 (2006) (arguing that foreign law's "confirmatory role" is evident because while case law has held national consensus to trump contrary foreign opinion, the inverse is not true: "[C]ontrary comparative legal materials cannot trump the national consensus.").

186. Jackson, *supra* note 183, at 124.

and give meaning to terms within the Constitution is one of great importance for American liberty and self-governance. Therefore, when the Supreme Court considers whether an American law comports to the United States Constitution, the principles considered logically should be American in nature.[187] As Justice Scalia explained:

> [W]e judges of the American democracies are servants of our peoples, sworn to apply, without fear or favor, the laws that those peoples deem appropriate. We are not some international priesthood empowered to impose upon our free and independent citizens supra-national values that contradict their own. If "international norms" had controlled our forefathers, democracy would never have been born here in the Americas.[188]

In light of this principle, it is difficult to see any logical relationship between American constitutional law and the views of other nations, specifically as they pertain to Eighth Amendment considerations.[189]

Moreover, as explained by Mill, Habermas, and a host of others, social norms and political ideologies that drive policy determinations develop within public opinion over time.[190] This process occurs via discussion, consideration, and ultimately, acceptance of the best argument available in the "marketplace of ideas."[191] The interaction of individuals within the public sphere facilitates the accommodation of new ideas via the thematization of topics, followed by give-and-take discussion and continued growth of conflicting positions until the strength of an argument prevails and is deemed accepted as truth within that society.[192]

187. *See* Thompson v. Oklahoma, 487 U.S. 815, 868–69 n.4 (1988) (Scalia, J., dissenting) ("We must never forget that it is a Constitution for the United States of America that we are expounding.").

188. Scalia, *supra* note 125, at 1122.

189. In fact, Chief Justice Roberts noted that the citation to foreign law creates other problems for self-governance:

> [J]udges of course are not accountable to the people, but we are appointed through a process that allows for participation of the electorate, the President who nominates judges is obviously accountable to the people. The Senators who confirm judges are accountable to the people. In that way the role of the judge is consistent with the democratic theory. If we're relying on a decision from a German judge about what our Constitution means, no President accountable to the people appointed that judge, and no Senate accountable to the people confirmed that judge, and yet he's playing a role in shaping a law that binds the people in this country.

Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 200–01 (2005) (testimony of John G. Roberts, nominee for Chief Justice of the United States).

190. *See supra* Part I.

191. *Id.*

192. *Id.*

Judicial use of foreign law does not necessarily prevent this process outright. However, if foreign law plays a persuasive role in constitutional determination, its use pre-empts at least part of an important discussion that should take place within *this* country. To be sure, Court decisions always pre-empt public discussion of the issues they address to some extent.[193] Generally pre-emption is a non-issue as citizens expect the "truth" of the Constitution's meaning to be discerned by the Court in a manner that does not involve any appeal to the public sphere.[194]

The difference with the Eighth Amendment is that it is consensus-based.[195] As such, the *Trop* standard directly gives import to the state of the present discussion of an Eighth Amendment issue in the public sphere.[196] The Court's attention to "the evolving standards of decency that mark the progress of a maturing society"[197] requires an examination of the debate as it has been resolved in the states.[198] To the extent that the discourse has achieved consensus in any one state, the Court can certainly further the democratic process by giving weight to that determination. Additionally, the Court should give weight to the fact that in some states, the discussion continues and may have some distance to cross before something resembling consensus is reached. When the Court relies upon these mechanisms for gauging the progress of American society, democracy is not circumvented.

However, the ongoing democratic process in those places where consensus has yet to occur is severely disrupted if the Court inserts the views of foreign nations—some of which may not have "evolved" via democratic inclusive discourse. If the Court uses foreign opinion as a persuasive factor in the interpretation of the Eighth Amendment, the judiciary runs the risk of supplanting the development of ideas in the public sphere with the views of the world community. While such a view is certainly appealing to opponents of the death penalty when focused on the end result, it undermines the democratic principles that have nourished American society for over two centuries.

The democratic process is best served when the discussion results in political action at the state level, where a consensus can be formed and implemented through the election of officials who will examine the will of the people and enact laws in the legislature that comport with their will. Until this occurs, it is in the best interests of democracy for the Court to stand aside, at

193. *See* QUIRK & BRIDWELL, *supra* note 14, at 8.

194. *See supra* notes 79–81 and accompanying text.

195. *See* Roper v. Simmons, 543 U.S. 551, 575–78, 564 (2005) (applying the *Trop* standard and noting that "[t]he beginning point is a review of objective indicia of consensus").

196. *See id.*

197. Trop v. Dulles, 356 U.S. 86, 101 (1958).

198. *See Roper*, 543 U.S. at 564 (requiring a review for consensus "as expressed in particular by the enactments of legislatures that have addressed the question.").

least as regards the Eighth Amendment, so that the public may cultivate the dialogue and arrive at a collective agreement.[199]

Proponents of foreign sources ignore the possibility that international law and opinion may be better utilized in the public sphere than in the courtroom. There is no reason that foreign practices cannot provoke reflection on our constitutional traditions in the political process. If foreign approaches to law and morality are truly persuasive, the democratic political process is well-equipped to assess them as such and integrate them into statutory or constitutional law.[200]

Finally, in that the Eighth Amendment *Trop* standard is concerned with the growth of society,[201] it is more beneficial to the evolution of these standards if the populace is allowed to engage in discussion and reach an agreement on the issue before outlawing it. As the death penalty goes, if we are to determine as a society that its imposition is unjust, then it is better that there be a collective decision not to execute the offenders than to allow a panel of judges to tie the hands of the executioner in avoidance of the social discussion. If this model is followed with regard to the Eighth Amendment, the Court will not interfere with the potential for social progress, and the public will have real potential to improve itself overall.

C. Possible Responses to Curb the Use of Foreign Legal Sources

In light of the conclusion that the use of foreign law creates undesirable results, not the least of which is to curb democratic debate on a variety of controversial and important social issues, it is important to consider ways in which the tendency to appeal to foreign sources might be limited or eliminated altogether.

199. Unfortunately, the Court did not take this approach in *Roper*. As Professor Young notes,

> [I]n *Roper* . . . [t]he national political branches had not, in fact, sat passively by as the rest of the world staked out positions on the juvenile death penalty. The Court, however, gave these political branch decisions the back of the hand. . . . The national political branches had plainly determined that the world's condemnation should not affect our own domestic law. But the Court adopted precisely the opposite course.

Young, *supra* note 164, at 164–65.

200. Whether the persuasive value of foreign opinion is better suited for consideration by the judiciary or the public may depend on the extent to which one trusts the citizenry's competence to consider complex issues, comprehend them, and take effective action through the political process. Those who distrust the ability of the public to intellectualize political, moral, and legal principles may prefer to leave such decisions to a more "sophisticated" judiciary. Justice Scalia argues against this cynicism: "We are not some international priesthood empowered to impose upon our free and independent citizens supra-national values that contradict their own." Scalia, *supra* note 125, at 1122.

201. *See supra* Parts II.A., II.C.

1. Congressional Action

A number of attempts have been made in Congress during recent years to discourage federal judges and Supreme Court Justices in particular from utilizing foreign law in their decisions.[202] These attempts include everything from prohibiting the use of foreign sources in constitutional decisions altogether[203] to simply recommending that such sources not be used.[204] While the commitment of members of Congress to maintaining the integrity of constitutional jurisprudence is admirable, a congressional mandate on how the Supreme Court should decide cases would be an overextension of congressional power.[205]

In order for each branch of government to be effective within the system of "checks and balances," Congress should not restrain the Court's ability to make judicial determinations as it sees fit.[206] If Congress could mandate how

202. *See* H.R. Res. 97, 109th Cong. (2005) (indicating a non-binding preference among members of the House of Representatives that foreign sources not be used to inform the meaning of the Constitution); S. Res. 2323, 108th Cong. (2004) (prohibiting the citation of foreign sources and allowing impeachment for breach of good behavior if such citations occur); H.R. Res. 3799, 108th Cong. (2004) (same); H.R. Res. 446, 108th Cong. (2003) (recommending that Justices not cite to foreign sources); H.R. Res. 468, 108th Cong. (2003) (same, but singling out Justices Kennedy, Stevens, Breyer, and Ginsburg as favoring the citation of foreign law).

203. H.R. Res. 3799, 108th Cong. (2004).

204. H.R. Res. 97, 109th Cong. (2005).

205. Congressional power to interfere with the Court's activities is not thoroughly addressed in the Constitution. However, the lack of discussion in the text does suggest that such authority is limited to circumscribing the Court's appellate jurisdiction.

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art III, § 2. In other words, the Constitution gives Congress the power to determine what cases the Court can hear, but does not give the power to direct *how* the Court can decide those cases. In *United States v. Klein*, the Court declared invalid a statute that required the Court to dismiss claims where the loyalty of the claimant depended upon presidential pardons. 80 U.S. 128 (1871). The Court reasoned that congressional action infringed upon the judicial power:

> Can we [dismiss such cases] without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it? We think not . . . . Congress has inadvertently passed the limit which separates the legislative from the judicial power.

Id. at 146–47.

206. Marbury v. Madison, 5 U.S. 137, 174–80 (1803); *see* THE FEDERALIST NO. 51, at 261 (James Madison) (Bantam ed. 1982) ("To what expedient then shall we finally resort for maintaining in practice the necessary partition of power among the several departments, as laid down in the constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior

the Court should rule on a particular issue, the Court's role as an arbiter of the law would be greatly diminished, if not eliminated altogether.[207]

Thus, as well-meaning as Congress may be in its attempts to pass laws and resolutions about the methodology of judicial interpretation, such actions would inadvertently circumvent the judiciary's constitutional function as a check on the legislature.[208] Such methods ought not be employed where they lead to results that threaten the purpose of the Judicial Branch.[209]

2. Action by the Executive

Another possible mechanism for the limitation of the use of foreign legal sources by the judiciary is through the executive's appointment of Justices who will refrain from appealing to foreign documents. However, executive action can likely only have limited success, as Supreme Court appointments are relatively rare and vacancies come at uncertain times.[210] Moreover, a

structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.").

207. Another issue that has been raised by Congress is whether the citation to foreign law is a violation of a Justice's oath and good behavior, warranting removal from the bench. *See* U.S. CONST. art III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour"); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 292–93 (2005) (questions of Sen. Tom Coburn, Member, S. Comm. on Judiciary) (stating that he believed citation to foreign law to be a violation of the oath taken by Justices, which does not constitute good behavior). Chief Justice Roberts stated in his confirmation hearing that he did not believe the citation of foreign law constituted a breach of the oath:

> I don't think [the citation of foreign law is] a good approach. I wouldn't accuse judges or Justices who disagree with that, though, of violating their oath. I'd accuse them of getting it wrong on that point, and I'd hope to sit down with them and debate it and reason about it. I think that Justices who reach a contrary result on those questions are operating in good faith and trying, as I do on the court I am on now, to live up to that oath that you read.

Id. at 293 (testimony of John G. Roberts, nominee for Chief Justice of the United States).

208. *See* David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75 (positing that the Necessary and Proper Clause grants Congress the power to facilitate the judiciary's powers, but intrinsically limits Congress's authority in that the Clause does not allow the Legislature to interfere with or subvert judicial independence); Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191 (2001) (arguing from an originalist point of view that the Constitution does not allow Congress to dictate how the Court decides cases); Lawrence G. Sager, Klein*'s First Principle: A Proposed Solution*, 86 GEO. L.J. 2525 (1998) (reading *Klein* as denying Congress the ability to require the Court to act against its best judgment in the judicial process).

209. "It is equally evident, that [no branch of government] ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers." THE FEDERALIST NO. 48, at 250 (James Madison) (Bantam ed. 1982).

210. Consider the vacancy left in 2005 by Chief Justice Rehnquist's death, coupled with Justice O'Connor's retirement.

prospective Justice's stance on foreign law is only one jurisprudential issue that should be considered when making appointments. Ultimately, the use of foreign law is only one issue in a broad array of other issues, and its import in the appointment process is only part of the equation.

Another problem with seeking reform through the executive is that as human beings, judges are not entirely predictable.[211] Therefore, even if the executive expects to appoint a certain "type" of judge, the President cannot be expected to forecast how a particular judge will rule over time and in what manner the methodology of a judge might change. Thus, reliance on the executive to ensure that foreign opinion plays no role in constitutional decisions is an ineffective remedy.

3. Criticism in the Public Sphere

A possible way for the public to participate in the eradication of foreign law from Supreme Court opinions is at the ballot box.[212] In other words, when voting for a presidential candidate, voters can consider the type of judge that candidate might appoint to the Supreme Court.[213] Votes can then be cast for candidates most likely to appoint judges who would refrain from citing foreign sources. But while the populace ought to consider a candidate's potential appointments to the Supreme Court, there are a plethora of other issues that must also be accounted for, and the people cannot be expected to ignore all other issues for the sake of the judiciary's use of foreign law. Additionally, the intent behind such an approach would appear results-oriented and politically motivated rather than methodologically focused. To that extent, judicial

211. *See* Linda P. Campbell, *Justice White: The Democrat Who Often Votes with Court Conservatives*, CHI. TRIB., March 21, 1993, at C18 (examining Justice White's tendency to vote with Court conservatives, though he was expected to be judicially liberal); Edward Lazarus, *Boomerang Justices—Ouch!*, L.A. TIMES, June 26, 2005, at M1 (providing a summary of judges who have not voted on the Court as their nominating Presidents expected); Todd S. Purdum, *A Justice Not Like the Others*, N.Y. TIMES, Nov. 3, 2005, at A24 (noting that Justice White "often emerged as a conservative force" even though he was appointed by a Democratic president); David G. Savage & Richard B. Schmitt, *Who May Succeed Rehnquist*, L.A. TIMES, June 26, 2005, at A1 (stating that although Justice Souter was expected to be judicially conservative, he has "voted regularly with the [C]ourt's liberal bloc."); Jeffrey Toobin, *Advice and Dissent: The Fight Over the President's Judicial Nominations*, NEW YORKER, May 26, 2003, at 42 (noting disappointment by Republicans when "[Justice] Souter turned out to be a moderate-to-liberal Justice" rather than the conservative jurist they had expected).

212. Indeed, considerations pertaining to the viewpoints of potential appointees to the federal bench already exist in regard to another controversial issue: abortion. *See* Jan Crawford Greenburg & Naftali Bendavid, *Rehnquist Illness Puts High Court in Spotlight*, CHI. TRIB., Oct. 26, 2004, at 1 (discussing the likely importance of Supreme Court appointments to voters concerned with abortion).

213. *Id.*

criticism at the ballot box may not be especially beneficial to the legal institution.

However, the public can effectively oppose the use of foreign citations in another way. Following the notion presented above that debate in the "marketplace of ideas" results in reaching truth on an issue,[214] an effective mechanism for removing foreign law from constitutional decisions is via public discourse. In fact, this has already gone on through the thematization of the issue discussed in newspapers, this Comment, and others like it.[215] Continued examination of the use of various sources in the Court's opinions over time should lead to pointed arguments on both sides, ultimately resulting in the acceptance of one view by a vast majority of scholars and concerned citizens. Thus, a consensus on the issue may be reached so that society at large favors a methodology that refuses to give weight to foreign opinion when interpreting the United States Constitution.

As long as a real discussion of methodology and theoretical constitutional law can occur in the public sphere, citizens will elucidate and expound upon important insights on the role of foreign law.[216] In the process, a general agreement should be reached over time so that the issue of reliance on foreign sources in constitutional decisions can resolve itself. As judges are selected from this populace, the result of the discussion would ideally result in the appointment of Justices who will not incorporate foreign views into the Court's decisions because they, like the public at large, believe that it undermines core democratic principles. Indeed, if democratic discourse is able to resolve issues in the manner suggested above, such a process may be successful in combating the problem.

4. Judicial Criticism and Ongoing Academic Discussion

Because it could take a long time for the public to reach a consensus, perhaps the best people to lead the discussion in the immediate are those whom the question of methodology most directly impacts; the judges themselves. In fact, this process is already taking place in dissenting opinions and other commentary produced by judges.[217] A vibrant discussion in the judicial sphere might very well yield results among current judges similar to what can be expected later in the public sphere. Indeed, results here might be more pronounced because the quality of discourse and the persuasiveness of the

214. *Supra* Part I.

215. *See supra* notes 5, 6, and 8.

216. *See supra* Part I.

217. *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (including debate between majority and dissent over the role of foreign law; discussed *supra* Part II.C.); Lawrence v. Texas, 539 U.S. 558 (2003) (including a similar debate to that in *Roper*); Atkins v. Virginia, 536 U.S. 304 (2002) (same; discussed *supra* Part II.B.).

arguments are likely to improve more rapidly when the issue is undertaken by scholars and experts on constitutional interpretation.

In addition to the Court's opinions, American judges have already engaged in the debate over foreign law in recent years in speeches and law journal articles.[218] As noted above, Justices Scalia and Breyer participated in a debate at American University over the role of foreign law.[219] Additionally, Justices Ginsburg, Breyer, and O'Connor have given speeches at the American Society of International Law supporting the use of foreign sources in Supreme Court opinions and advocating continued exploration of the issue.[220] Taking a moderate approach, Judge Diarmuid F. O'Scannlain of the Ninth Circuit Court of Appeals recently spoke in London and noted that while foreign legal sources may have beneficial effects in American jurisprudence, courts should take "a cautious approach to comparative constitutionalism."[221]

Outside the Supreme Court, Judge Posner of the Seventh Circuit has been one of the most outspoken critics of the use of foreign law in domestic constitutional decisions.[222] In particular, Judge Posner has noted that citing foreign law involves various risks, including allowing the political stances of judges to inadvertently creep into opinions, undermining democratic notions of

218. *See* Stephen Breyer, Keynote Address at the Annual Meeting of the American Society of International Law (Apr. 2003), *in* 97 AM. SOC'Y INT'L L. PROC. 265 (2003) (supporting consideration of foreign law in constitutional jurisprudence, and noting five ways that consideration of such sources has had a "growing impact on [his] professional life"); Ruth Bader Ginsburg, "A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication, Keynote Address at the Annual Meeting of the American Society of International Law (Mar. 31–Apr. 2, 2005), *in* 99 AM. SOC'Y INT'L L. PROC. 351 (2005) (supporting the growth of comparative analysis in constitutional law); Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of A Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329, 329 (finding great value in judicial consideration of international law: "We are the losers if we do not both share our experience with, and learn from others."); Sandra Day O'Connor, Keynote Address at the Annual Meeting of the American Society of International Law (Mar. 16, 2002), *in* 96 AM. SOC'Y INT'L L. PROC. 348 (2002) (noting the benefit comparative legal analysis can have in American jurisprudence); O'Scannlain, *supra* note 8 (providing cautious support for the use of foreign law in American jurisprudence); Posner, *supra* note 8 (disapproving of recent uses of foreign law in Supreme Court decisions); Antonin Scalia, Foreign Legal Authority in the Federal Courts, Keynote Address at the Annual Meeting of the American Society of International Law (Apr. 2, 2004), *in* 98 AM. SOC'Y INT'L L. PROC. 305 (2004) (arguing that while foreign legal sources may be instructive in certain rare cases, foreign law is never relevant to interpreting the meaning of the Constitution); Scalia & Breyer, *supra* note 6 (debating the merits of relying on foreign law in constitutional decisions); *see also* Robert H. Bork, *Travesty Time Again*, NAT'L REV., March 28, 2005, at 17–18 (criticizing the use of foreign and international opinion in *Roper* as a "dazzling combination of lawlessness and moral presumption").

219. Scalia & Breyer, *supra* note 6.

220. Breyer, *supra* note 218; Ginsburg, *supra* note 218; O'Connor, *supra* note 218.

221. O'Scannlain, *supra* note 8, at 1907–08.

222. Posner, *supra* note 8.

self-governance, and incorporating authorities into American law without a thorough understanding of the legal structures where foreign legal opinions are produced.[223] Likewise, former Supreme Court nominee Robert Bork has criticized the Court's use of foreign law as a move toward allowing international opinion to mold the Constitution.[224] Additionally, legal scholars have grappled with the debate in recent years, with much disagreement about the proper role of foreign law, if any, in constitutional decision-making.[225]

The increasing amount of literature from scholars and judges alike is promising in that it suggests an ongoing discussion of the issue is taking place whereby the issue might be resolved in the nature of Habermas's notion of democratic truth-finding. The quality of the debate among jurists and scholars can only be a positive force in the gradual resolution of this issue in American jurisprudence. It is to this body of legal scholarship that this Comment humbly attempts a contribution.

CONCLUSION

Because the Supreme Court's decisions are integral to the preservation of American liberty, it is important to examine the tools used by the Court to ensure that those tools do not hinder American democracy. If nothing else, when dealing with consensus-based precedents, such as that in Eighth Amendment jurisprudence, it is important that the Court incorporates democratic ideals into its consideration. Looking to foreign opinion for a determination of what constitutes "cruel and unusual punishment" oversteps that boundary. If this trend continues, it may lead to an atmosphere where convincing a majority of one's fellow citizens is no longer the way to achieve social change; instead one may only need to convince five Supreme Court Justices that the rest of the world has provided an answer.

But no matter how we, the public, decide to approach the issue, the goal must be a more robust democratic conversation. Perhaps, then, all four of the above-mentioned approaches have a place in the gradual determination of what

223. *Id*. at 84–90.

224. Bork, *supra* note 218, at 17–18.

225. *See* Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization":* Lawrence *and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1298–1327 (arguing that the use of foreign law might be relevant for purposes of predicting whether a new rule of law will be effective, or explaining differences between legal systems, but not for the purpose of determining moral facts relevant to the Constitution); David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005) (suggesting in part that the American Constitution is unavoidably influenced by foreign law because there is overlap and reciprocity in various legal systems); McGinnis, *supra* note 8 (arguing that foreign law allows judges to place their personal views in their decisions, undermines principles of self-governance, and reduces the diversity of political approaches in the world).

role foreign law has in American domestic constitutional decisions, if any. Even in the legislature's overtures against the use of foreign law and attempted mandates, a communication occurs with the public. In this way issues are thematized and thrown into the realm of public discourse for closer examination.

There is little doubt that when Senators Tom Coburn and Jon Kyl recently commented on Chief Justice Roberts's views on the use of foreign law at his confirmation hearings that they were communicating to both the Court and their constituents their own personal views as well.[226] Open and conscientious discussion on any issue is good for American society.[227] However, while the citation of foreign sources seems to run contrary to democratic principles, it is important that the discussion of their use not be prematurely interrupted. After all, one can hardly claim to support discourse as a method of truth-finding while simultaneously imposing a prohibition on others before a meaningful consensus is reached. It is this author's hope that when the issue is ultimately resolved, democratic principles will prevail and the use of foreign law as a basis for Eighth Amendment decision-making will become a thing of the past.

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226. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 292–93 (2005) (questions of Sen. Tom Coburn, Member, S. Comm. on Judiciary) (stating that he believed citation to foreign law to be a violation of the oath taken by Justices and a breach of good behavior); *Id.* at 199–200 (questions of Sen. Jon Kyl, Member, S. Comm. on Judiciary) (stating that he believed citation to foreign law had no place in domestic constitutional decisions).

227. *See supra* Part I.

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